Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 15.

ORIGINAL.

COMMONWEALTH OF KENTUCKY, *Petitioner*,

vs.

ANDREW M. J. COCHRAN, *Defendant*.

ON PETITION FOR WRIT OF MANDAMUS.

BRIEF FOR DEFENDANT IN REPLY.

The "equal civil rights" spoken of in *section 641 Rev. St. U. S.* embrace and include a right to be tried by a jury selected from men summoned without class discrimination.

That right is a right secured by *section 1977 Rev. St. U. S.*, and by the "equal protection of the laws" clause of the fourteenth amendment.

The case of *Strauder vs. West Virginia, 100 U. S., 303*, is decisive as to both these points.

That case decides, *arguendo*, that a law which denies to an Irishman, being tried under a charge of crime, the right to have the jury to try him selected from men summoned without

discrimination against Irishmen would entitle the Irishman to a removal under *section 641.*

It decides also, *arguendo*, that a law which excludes white persons from serving on juries would entitle a *white* person to a removal under *section 641.*

It necessarily follows that the rights of *white* persons, and of *Irishmen*, are rights embraced by *section 641.* Hence the contention of counsel that *section 641* protects the rights of negroes only is unsound. Furthermore, that contention does violence to the express language of *section 1977.* For that section purports to confer rights on "*all* persons within the jurisdiction of the United States." It would be a most strained construction of a statute which purported to confer rights on "all persons" to say that it conferred rights on no persons other than negroes.

The preamble to the amendment to the Civil Rights Act of 1875 shows clearly the intent of Congress to be to confer rights, not on colored persons only, but on "all, of whatever nativity, race, color or persuasion, religious or *political.*"

The equal protection of the laws clause of the fourteenth amendment is itself "a law providing for the equal civil rights of citizens of the United States." *Section 1977 Rev. St. U. S.* "puts in the form of a statute what was substantially ordained by the constitutional amendment," as this court said in *Strauder vs. West Virginia, 100 U. S., 303.*

The case of *In re Wells, 3 Woods, 128,* so much relied upon by counsel for petitioner in his oral argument, was de-

cided February 1st, 1878. The conclusion therein that a *legislative* denial only was embraced by *section 641* is based upon the premise that the prohibitions of the fourteenth amendment apply to *legislative* action only. The language of Mr. Justice Bradley is, "The fourteenth amendment to the Constitution, which guarantees the equal benefit of the laws on which the present application is based, only prohibits *state legislation* violative of said right."

Surely that statement is not the law. This court has since then, time and time again, decided that the prohibitions of the fourteenth amendment apply to action by the state through any of its departments,—executive, legislative or judicial.

For several years after the adoption of the fourteenth amendment, two ideas in regard thereto were prevalent, both of which have been completely exploded by numerous later decisions of this court. They were—

1. The rights protected by that amendment were the rights of negroes only. An *obiter* expression in the opinion of Mr. Justice Miller in the *Slaughter House Cases* lent some color to this idea. It is spoken of by Mr. Guthrie in his work on the fourteenth amendment, page 20, as a statement that seems to us of the present day, in the light of later decisions of this court, an "astonishing statement." This idea no longer prevails. The contrary has been settled by this court in numerous cases:

Holden vs. Hardy, 169 U. S., 382; Yick Wo vs. Hopkins, 118 U. S., 369; Guthrie on the Fourteenth Amendment, pp. 20 and 110; Santa Clara vs. Southern Pacific R. Co., 18 Fed., 397.

2. The prohibitions of the fourteenth amendment applied to legislative action only by a state, and not to any executive or judicial action by state officers.

This idea has also been set at rest long ago by repeated decisions of this court. *Ex parte Virginia, 100 U. S., 339; Yick Wo vs. Hopkins, 118 U. S., 356; Chicago, etc., R. Co. vs. Chicago, 166 U. S., 226; Scott vs. McNeal, 154 U. S., 34; Neal vs. Delaware, 103 U. S., 370.*

The statements quoted from opinions of this court to the effect that for denials arising from judicial action during the trial the remedy was by writ of error, and not by removal, are not in point. For, evidently, the "trial" referred to is the "trial" spoken of in *section 641*, to-wit, the *last and final* trial. This is apparent from the reason given in *Virginia vs. Rives, 100 U. S., 313*, why such judicial denials are not embraced by *section 641;* to-wit, they occur *after* the petition for removal is required to be filed.

On the question as to a defendant's right to have the jury to try him selected from men summoned without class discrimination, the decision of the Scott Circuit Court in the present case is in striking contrast to the decision of the trial court in *Murray vs. Louisiana, 163 U. S., 101.* In that case the trial court decided, and put that decision on its records, that "it was undeniable that the exclusion from the general service of all people of the African race on account of their color would be an unlawful abridgement of the rights of such citizens." In the present case the Scott Circuit Court decided that Caleb

Powers had no right to complain of the exclusion from the venire of Republicans because of their being Republicans.

The one court expressly admitted the existence of the right, given to the defendant by the Constitution and laws of the United States, to a jury selected without class discrimination. The other court *denied* that the defendant had any such right.

The error of the Scott Circuit Court, in deciding that Powers had no right to demand that the jury which the state empanels to try him shall be selected from men summoned without class discrimination, cannot be corrected on writ of error to this court, without giving to *section 709, Rev. St. U. S.*, a broader construction than has ever heretofore been given to it, and broader, I respectfully submit, than its language will bear. The present case comes within the very letter of *section 641, Rev. St. U. S.*

Should *section 709* be so *broadened* by construction as to include a case clear outside its terms, in order to so *narrow section 641* as to exclude a case that is within its very terms?

Suppose, for illustration, there was, in addition to this jury question, another Federal question also in Caleb Powers' case, of which the Court of Appeals of Kentucky did have jurisdiction: If that court should decide that other question against Powers, and should affirm a judgment of conviction against him, then this court could "re-examine and reverse or affirm" that judgment of the Court of Appeals under *section 709*, on the ground that it was a judgment of the highest court of Ken-

tucky "in which a decision in the suit could be had." Could this court "re-examine" the judgment of the Scott Circuit Court also, and reverse it on the jury question? If so, it would necessarily follow that both the Scott Circuit Court and Kentucky Court of Appeals are *each* "the highest court of the state in which a decision in the suit can be had," and two writs of error from judgments of those two courts, in the same case, could be pending, at the same time, in this court.

Section 641 does not make the right of removal depend upon the *future* actions of ministerial officers. Whether such officers will or will not act fairly in the future is, in the nature of things, a matter incapable of proof. Congress chose to make the right to a removal depend upon the *present* attitude of the *court* toward the rights secured by the Constitution and laws of the United States, and not upon the possibility, or probability, that such rights will be hereafter violated. To have made the right of removal dependent upon an ability to prove what the *future* actions of a court, or of ministerial officers, would be, would have made that right incapable of enforcement in any case.

Counsel argues that the present judge of the Scott Circuit Court is not the same man who was judge at the former trials, and that he may decide differently as to Powers' right to a jury selected without class discrimination. But the court is the same, and the fair presumption is that the court will adhere to its former decisions on questions of law, until they are reversed or overruled.

Judge Coxe in the case of *Hadden vs. Natchang Silk Co., 84 Fed., 80*, thus clearly states the rule which governs trial courts in this matter.

"Different judges do not make different courts. When the Circuit Court has spoken through any of its judges its decision should be, and generally is, regarded as controlling upon all the others. This is the spirit of American jurisprudence. We sacrifice much to precedent. A proposition once decided between the same parties on similar facts must stand decided. It is of little moment that the decision was made by another than the sitting judge. If entitled to any consideration this circumstance gives the decision even greater weight. A judge may change his own mind; he cannot change the mind of another."

It is respectfully submitted that the petition for mandamus should be denied.

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